

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Gary P. and Sandra Siepelmeyer

Chapter 7

Debtor(s).

Bky Case No.: 04-33319

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion, before the Honorable Gregory F. Kishel at 11:00 a.m. on October 19, 2004, in Courtroom No. 228B, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than October 14, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than October 7, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Gary P. and Sandra L. Siepelmeyer

Chapter 7

Debtor(s).

Bky Case No.: 04-33319

NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)

TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion, before the Honorable Gregory F. Kishel at 11:00 a.m. on October 19, 2004, in Courtroom No. 228B, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than October 14, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than October 7, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

3. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file

this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on June 3, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-

5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors have listed the following debts:

(a) On Schedule D, Creditors Holding Secured Claims, the debtors have listed two claims totaling \$ 137,741.00. The claims are secured by a 1st and 2nd mortgage on the debtors homestead. The debtors plan to retain the home.

(b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors have listed no claims.

(c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors have listed five claims totaling \$ 34,000.00.

(d) The debts listed in the debtor's Schedule of Liabilities appear to be primarily consumer debt. These debts are comprised of credit incurred to purchase consumer items. *See* Debtor's Schedule F

8. On Schedule I, Current Income of Individual Debtor(s) the debtors have listed a Combined Monthly Net Income of \$3,312.00. However, according to copies of each of the debtors

paycheck stubs dated 7/10/04 their Combined Monthly Net Income is \$3,734.50.^{1/} The debtors are married and have no dependents.

9. On Schedule J, Current Expenditures of Individual Debtor(s) the debtors have listed Total Monthly Expenses of \$3,427.00. The expenses include a payment for “Credit Card Account” of \$803.00, which should be should be eliminated. Total Adjusted Monthly Expenses \$2,624.00. Also, in review of the debtors’ bank statements for the period of December 2003 through May 2004, there are several hundreds of dollars per month withdrawn at Treasure Island Casino. Neither debtor is employed by the casino.

10. Total Monthly Net Income of \$3,734.50 minus the Adjusted Monthly Expenses of \$2,624.00 provides the debtors with a monthly disposable income of \$1,110.50. Over a 36 month chapter 13 plan the debtors would have \$39,978.00 with which to repay creditors. The debtors would be able to repay 100% of their Unsecured Non-priority claims in approximately 31 months.

11. The debtors are both currently employed, and there does not appear to be any likelihood that their employment will be terminated at any time in the future.

12. The debtors have the ability to repay a substantial portion of their general unsecured

^{1/} This amount was figured by taking the debtors combined YTD income of \$24,992.45 divided by 29th pay period = \$861.81 x 52 weeks = \$44,814.12 divided by 12 months = \$3,734.50.

For security, the pay stubs are not attached to avoid dissemination of sensitive information on the internet. Upon request, the U.S. Trustee can provide a copy of these documents to counsel for the debtor (if a copy was not retained) or the chapter 7 trustee and may submit the pay stubs at any hearing.

debt and there appears to be no reason for their unwillingness to do so.

13. In the alternative, the United States Trustee does not oppose conversion of the case to Chapter 13.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: September 7, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500

VERIFICATION

I, Sarah J. Wencil, attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: September 7, 2004

Signed: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Gary P. and Sandra L. Siepelmeyer

Chapter 7

Debtor(s).

Bky Case No.: 04-33319

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

This memorandum is submitted pursuant to Local Rule 9013-2(a). It appears that dismissal of this Chapter 7 case is appropriate under 11 U.S.C. 707(b).

Analysis

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b)(1994). The United States Trustee bears the burden of showing substantial abuse.

In re Dubberke, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

(1) The Debtor's Debts Are Primarily Consumer Debts.

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to

payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debtor's debts are 100% consumer debts.

(2) The Granting of Relief under Chapter 7 Constitutes Substantial Abuse of Chapter Seven of the Bankruptcy Code.

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988); *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13

petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In the present case, the debtors have the ability to repay 100% of their general unsecured creditors in less than thirty six months. Their ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: September 7, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014

(612) 664-5500

CERTIFICATE OF SERVICE

In Re:)	
)	
Gary P. and Sandra Siepelmeyer)	Bankruptcy No. 04-33319
)	
Debtor(s).)	Chapter 7 Case
)	
)	


I, Terri L. Frazer, declare under penalty of perjury that on September 7, 2004, I served a copy of the foregoing proposed Notice of Hearing on Motion to Dismiss Chapter 7 Case, Notice of Hearing and Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law and proposed Order by U.S. mail, postage prepaid, to each person named below:

Gary P. and Sandra L. Siepelmeyer
161 Fairview Lane
Red Wing, MN 55066

Larry D. Johnson
1626 Old West 3rd Street
Red Wing, MN 55066

Patti Sullivan
P.O. Box 16406
St. Paul, MN 55116

Dated: 9-7-04

By: 
Office of the United States Trustee

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Gary P. and Sandra L. Siepelmeyer

Chapter 7

Debtor(s).

Bky Case No.: 04-33319

ORDER

At St. Paul, Minnesota, the _____ day of _____, 2004, the hearing on the Motion of the United States Trustee's Office for an Order dismissing this Chapter 7 case pursuant to 11 U.S.C. §707(b) came before the undersigned. Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That the Chapter 7 bankruptcy case filed by the above-captioned debtor is dismissed pursuant to 11 U.S.C. Section 707(b).

The Honorable Gregory F. Kishel
United States Bankruptcy Judge